

## **BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION**

John M. & Sherry L. Polk,  
Appellant,

v.

Keith County Board of Equalization,  
Appellee.

Case No: 13A 028

Decision and Order Affirming the  
Determination of the Keith County Board of  
Equalization

### **For the Appellant:**

Joshua Wendell,  
McQuillan Law Office

### **For the Appellee:**

Randy Fair,  
Keith County Attorney

The appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

## **I. THE SUBJECT PROPERTY**

The Subject Property is a 115.1 acre parcel consisting of 96.6 acres of accretion land and 18.5 acres of deeded land located in Keith County, Nebraska. The legal description of the Subject Property is found at Exhibit 1. The property record card for the Subject Property is also found at Exhibit 1.

## **II. PROCEDURAL HISTORY**

The Keith County Assessor determined that the assessed value of the Subject Property was \$161,830 for tax year 2013. John M. & Sherry L. Polk (the Taxpayer) protested this assessment to the Keith County Board of Equalization (the County Board) and requested an assessed valuation of \$41,285. The County Board determined that the taxable value of the Subject Property for tax year 2013 was \$167,440.<sup>1</sup>

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties exchanged exhibits and submitted a Pre-Hearing Conference Report, as ordered by the Commission. The Commission held a hearing on October 2, 2014.

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<sup>1</sup> Exhibit 1.

### III. STANDARD OF REVIEW

The Commission's review of the determination of the County Board of Equalization is de novo.<sup>2</sup> When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."<sup>3</sup>

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.<sup>4</sup>

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.<sup>5</sup> Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.<sup>6</sup>

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.<sup>7</sup> The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.<sup>8</sup>

In an appeal, the commission "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or

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<sup>2</sup> See, Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.), *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

<sup>3</sup> *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

<sup>4</sup> *Id.*

<sup>5</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>6</sup> *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

<sup>7</sup> Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

<sup>8</sup> *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.”<sup>9</sup> The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”<sup>10</sup> The Commission’s Decision and Order shall include findings of fact and conclusions of law.<sup>11</sup>

## IV. EQUALIZATION

### A. Law

“Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.”<sup>12</sup> Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.<sup>13</sup> The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.<sup>14</sup> In order to determine a proportionate valuation, a comparison of the ratio of assessed value to market value for both the Subject Property and comparable property is required.<sup>15</sup> Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity.<sup>16</sup> Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.<sup>17</sup> The constitutional requirement of uniformity in taxation extends to both rate and valuation.<sup>18</sup> If taxable values are to be equalized it is necessary for a Taxpayer to establish by “clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere

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<sup>9</sup> Neb. Rev. Stat. §77-5016(8) (2012 Cum. Supp.).

<sup>10</sup> Neb. Rev. Stat. §77-5016(6) (2012 Cum. Supp.).

<sup>11</sup> Neb. Rev. Stat. §77-5018(1) (2012 Cum. Supp.).

<sup>12</sup> *Neb. Const.*, Art. VIII, §1.

<sup>13</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

<sup>14</sup> *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).

<sup>15</sup> See, *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).

<sup>16</sup> *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

<sup>17</sup> *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

<sup>18</sup> *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).

error of judgment [sic].”<sup>19</sup> “There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.”<sup>20</sup>

All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.<sup>21</sup>

Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure.<sup>22</sup>

Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:

- (a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and
- (b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production shall be defined as agricultural land or horticultural land.<sup>23</sup>

Agricultural land and horticultural land shall be valued for purposes of taxation at seventy five percent of its actual value.<sup>24</sup> “Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section.”<sup>25</sup>

## **B. Summary of the Evidence**

John M. Polk, the Taxpayer and a licensed broker of farm real estate, asserted that the Subject Property was not equalized with neighboring properties, because the accretion acres located on the Subject Property are valued at \$1,585 per acre while the accretion acres located on other properties are valued as low as \$255 per acre. Polk purchased the Subject Property for

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<sup>19</sup> *Newman v. County of Dawson*, 167 Neb. 666, 670, 94 N.W.2d 47, 49-50 (1959) (Citations omitted).

<sup>20</sup> *Id.* at 673, 94 N.W.2d at 50.

<sup>21</sup> Neb. Rev. Stat. §77-201(1) (Reissue 2009).

<sup>22</sup> Neb. Rev. Stat. §77-1359 (1) (Reissue 2009).

<sup>23</sup> Neb. Rev. Stat. §77-1359 (2) (Reissue 2009).

<sup>24</sup> Neb. Rev. Stat. §77-201 (2) (Reissue 2009).

<sup>25</sup> Neb. Rev. Stat. §77-132 (Reissue 2009).

recreational purposes, including hunting and fishing.<sup>26</sup> He considered that he was not treated uniformly with other parcels with accretion land.

Polk testified that a supermajority of the Subject Property consists of accretion acres that are unsuitable for row crop production or other agricultural or horticultural uses other than livestock grazing. He also testified that he installed a well and pump with the intention to provide water for livestock, and that he fenced in the Subject Property for the purpose of containing livestock, but a flood in 2013 washed out the fence. He also asserted that he planted wheat on 11 acres of the Subject Property in 2011, but a drought, and the failure of his tenant farmer to spray for weeds, prevented the wheat crop from producing.

Polk asserted that he was the real estate broker involved in the sale of the Subject Property and contiguous parcels in 2011. He testified that based upon his personal experience he agreed with the actual value of \$1,585 per acre for the Subject Property's accretion land. He testified that he purchased the Subject Property for recreational purposes, including hunting and camping, but that after purchasing the Subject Property he attempted agricultural or horticultural uses on the Subject Property in an attempt to minimize the cost of property taxes.

Polk testified that it is common practice in the area for land owners to lease out accretion areas to hunters, and that he was aware that his neighbor across the river did so. He asserted that the accretion acres of the neighbor's parcel were only assessed at \$255 per acre. He also asserted that his neighbors to the west and east also hunt the properties, but he was not aware of any leases for hunting purposes. He further asserted that the County Assessor could not support her \$255 per acre special valuation of accretion acres with sales or any market data.

Cheryl Schiel, Keith County Assessor, testified that she first became the County Assessor in 1998. She testified that she reviewed all of the parcels in Keith County that had received special valuation. Based upon her review, she determined that all parcels which consisted of a majority of accretion acres did not constitute agricultural land and horticultural land and could not receive special valuation without additional evidence that a majority of the acres of the parcel were used for agricultural or horticultural purposes. She asserted that if owners applied for special valuation and could demonstrate that the majority of the acres of the parcel were being used for

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<sup>26</sup> Polk testified that he paid \$185,000 for the Subject Property on July 22, 2010. See also Exhibit 2:5.

agricultural or horticultural purposes then she would recommend that the County Board approve the applications.

Schiel testified that the difference in assessed value between the Subject Property's accretion acres at \$1,585 and the accretion acres located on other properties with an assessed value of \$255 was directly and only related to a determination that the Subject Property parcel was not agricultural land and horticultural land and therefore did not qualify for special valuation, while the other parcels were agricultural land and horticultural land and did qualify for special valuation.

### **C. Analysis**

Agricultural land and horticultural land is a separate and distinct class of real property and is not required to be assessed uniformly or proportionately in relation to other classes of real property.<sup>27</sup>

The Taxpayer agrees with the County Board's determination of the actual value of the accretion acres located on the Subject Property. His only assertion is that accretion acres located on neighboring agricultural land and horticultural land receiving special valuation are assessed at materially different levels of value as compared to the accretion acres of the Subject Property. The County Assessor concedes that accretion acres are valued at materially different levels on agricultural land and horticultural land parcels as opposed to accretion acres found on any other class of real property.

The Nebraska Constitution permits and the Nebraska Legislature grants the authority<sup>28</sup> for agricultural land and horticultural land to be assessed at materially different levels than similar property when the parcel is a different class of real property.<sup>29</sup> The Commission has reviewed the property record files for the Subject Property and the 2014 property record files containing the total 2013 assessed values for other parcels with accretion acres in Keith County.<sup>30</sup> The Commission notes that all agricultural land and horticultural land parcels receiving special

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<sup>27</sup> See, *Krings v. Garfield County Board of Equalization*, 286 Neb. 352, 835 N.W.2d 750 (2013) (citing Neb. Const. art. VIII, § 1(4) and Neb. Rev. Stat. §77-1359).

<sup>28</sup> See, Neb. Const. art. VIII, § 1(4); See also, Neb. Rev. Stat. §77-1359).

<sup>29</sup> See, *Krings v. Garfield County Board of Equalization*, 286 Neb. 352, 835 N.W.2d 750 (2013).

<sup>30</sup> See, E12.

valuation are valued at uniform levels when compared with other agricultural land and horticultural land parcels receiving special valuation, and that parcels that are not agricultural land and horticultural land are also valued at uniform levels when compared with other parcels that are not classified as agricultural land and horticultural land parcels.

The Taxpayer asserted that some agricultural land and horticultural land parcels receiving special valuation also contained accretion acres used for recreational purposes, or were leased for recreational purposes. However, the Commission finds that there is not clear and convincing evidence that these parcels' uses are not primarily for agricultural or horticultural purposes. An owner of a parcel of agricultural land and horticultural land receiving special valuation may conduct other incidental uses on the property that do not constitute a primary use of the parcel for agricultural or horticultural purpose.<sup>31</sup>

## **V. CONCLUSION**

The Commission finds that there is not competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. The Commission also finds that there is not clear and convincing evidence that the County Board's decision was arbitrary or unreasonable.

For all of the reasons set forth above, the decision of the County Board should be affirmed.

## **VI. ORDER**

IT IS ORDERED THAT:

1. The decision of the Keith County Board of Equalization determining the taxable value of the Subject Property for tax year 2013 is affirmed.<sup>32</sup>
2. The taxable value of the Subject Property for tax year 2013 is \$167,440.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Keith County Treasurer and the Keith County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2012 Cum. Supp.).

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<sup>31</sup> See generally, Neb. Rev. Stat. §77-1359(1) (indicating that it is the primary use of parcel that drives a determination of whether the parcel is agricultural or horticultural).

<sup>32</sup> Assessed value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2013.
7. This Decision and Order is effective for purposes of appeal on October 16, 2014.

Signed and Sealed: October 16, 2014

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Robert W. Hotz, Commissioner

SEAL

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Nancy J. Salmon, Commissioner

Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2012 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.